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Fred Meyer Stores, Inc. and United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union. Case 19-CA-32311

May 7, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND BECKER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 14, 2010, the General Counsel issued the complaint on February 1, 2010, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-15194. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 18, 2010, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On February 22, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The General Counsel filed a reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent has effectively admitted its refusal to bargain,¹ but contests the validity of the certification

¹ The Respondent asserts that even though it is not obligated to do so, it has been bargaining in good faith with the Union, as evidenced by its willingness to meet and confer and its exchange of proposals. The Respondent's asserted "bargaining," however, has consisted of rejecting a proposal made by the Union, proposing to hold the Union's information request in abeyance, and proposing to delay bargaining until the current contract expires or the question of the Board's statutory authority to issue decisions is resolved by the Supreme Court. Further, the Respondent has consistently stated that it does not have any legal obligation to bargain with the Union. In these circumstances, it is clear that the Respondent's purported bargaining, which is largely premised on a future event, is conditional. Contrary to the Respondent, such conduct does not constitute bargaining in good faith. See, e.g., *Special-*

based on its argument that the two-member Board lacked the statutory authority to issue its Order denying the Respondent's request for review of the Regional Director's decision and direction of election in the underlying representation proceeding.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a State of Ohio corporation with an office and place of business in Tacoma, Washington (the University Place Store), is engaged in the retail grocery business.

ized Living Center, 286 NLRB 511 (1987), *enfd.* 879 F.2d 1442 (7th Cir. 1989)(employer's offer to "meet and confer" was conditional and did not constitute offer to bargain in good faith where employer also stated it had no legal obligation to recognize or bargain with the union); *Henry M. Hald High School Assn.*, 213 NLRB 463 (1974), *enfd. mem.* 559 F.2d 1204 (2d Cir. 1977) (finding a failure to bargain in good faith based in part on the respondent's request to postpone bargaining until the issuance of a pending state court decision).

² The Respondent asserts in its response that it could not have previously raised its objection to the Board's authority to issue a decision in the representation proceeding, and that therefore the issue is properly raised at this time and can be litigated in this unfair labor practice proceeding. Further, in its answer, the Respondent states that it intends to preserve the arguments it raised in the representation proceeding until the status of the two-member Board is conclusively determined. We find no merit in the procedural aspect of the Respondent's argument because nothing precluded the Respondent from raising this issue in the representation proceedings. We also find without merit the substantive aspect of its argument. See, e.g., *ADF, Inc.*, 355 NLRB No. 14, *slip op.* at 1 *fn.* 1.

In addition, the Respondent's answer specifically denies, in part, pars. 6(b) and (c) of the complaint, which allege that the Union was certified to bargain on behalf of the voting group of Playland Department employees at the Respondent's University Place retail store in Pierce County, Tacoma, Washington. The unit issue, however, was litigated and resolved in the underlying representation proceeding. Accordingly, to the extent that the Respondent's denials of these allegations can be construed as an attack on the unit, they do not raise any litigable issues. See *Alta Vista Regional Hospital*, 352 NLRB 809, 809 *fn.* 3 (2008).

³ The Respondent's motion to dismiss the complaint, its request for a hearing before an administrative law judge, and its request for oral argument are therefore denied.

During the 12-month period preceding the issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

The following employees of the Respondent (the unit) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed in [the Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County . . . excluding the Department Manager and two Assistant Department Managers.

Since at least 1990, and at all material times, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 6, 2007, to May 1, 2010.

On June 17, 2009, in Case 19-RC-15194, a majority of all regular full-time and regular part-time employees employed in the Playland Department of the Respondent's University Place store, in a self-determination election, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, to be included in the unit.

On December 8, 2009, in Case 19-RC-15194, the Regional Director issued a corrected certification of representative certifying that the Union may bargain for the voting group of Playland Department employees described above as part of the unit of employees that it currently represents.

The following employees of the Respondent (the expanded unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed in [the Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County and all regular full-time and regular part-time employees employed in the Playland Department of [the Respondent's] University Place store, located in Tacoma, Washington; excluding the Department Manager and two Assistant Department Managers in Pierce County and all guards and supervisors in the University Place store as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees in the expanded unit under Section 9(a) of the Act.

B. Refusal to Bargain

On October 26, and on December 3 and 8, 2009, the Union requested, in writing, that the Respondent meet and bargain collectively with it as the exclusive collective-bargaining representative of the Playland Department employees at its University Place Store. On November 5, 2009, and January 7, 2010, the Respondent, in writing, informed the Union that it would not bargain unconditionally with it as the exclusive collective-bargaining representative of the Playland Department employees at its University Place store. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since November 5, 2009, to bargain with the Union as the exclusive collective-bargaining representative of employees in the Playland Department at its University Place Store, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Fred Meyer Stores, Inc., Tacoma, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Local 367, affili-

ated with United Food and Commercial Workers International Union, as the exclusive bargaining representative of the employees employed by the Respondent in the Playland Department at its University Place Store.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees employed in the Playland Department of its University Place, Tacoma, Washington store as part of the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All employees employed in [the Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County and all regular full-time and regular part-time employees employed in the Playland Department of [the Respondent's] University Place store, located in Tacoma, Washington; excluding the Department Manager and two Assistant Department Managers in Pierce County and all guards and supervisors in the University Place store as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Tacoma, Washington, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 5, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 7, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union, as the exclusive collective-bargaining representative of our employees in the Playland Department of our University Place retail store located in Tacoma, Washington.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conditions of employment for our employees in the Playland Department of our University Place, Tacoma, Washington store as part of following bargaining unit:

All employees employed in our Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County and all regular

full-time and regular part-time employees employed in the Playland Department of our University Place store, located in Tacoma, Washington; excluding the Department Manager and two Assistant Department Managers in Pierce County and all guards and supervisors in the University Place store as defined by the Act.

FRED MEYERS STORES, INC.